85-1730

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF NEW JERSEY,

Petitioner,

vs.

MIMS HACKETT, JR.,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATE OF NEW JERSEY,

Petitioner,

vs.

MIMS HACKETT, JR.,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

The respondent, Mims Hackett, Jr., was indicted on May 4, 1976 by an Essex County Grand Jury, and was charged in four counts with the crimes of atrocious assault and battery, kidnapping and threatening to take the life of another. Hackett entered pleas of not guilty to all of the charges (Appendix A, A1a).

Hackett was tried by jury and was found guilty of simple assault and battery (N.J.S.A. 2A:170-26), a disorderly persons offense, and kidnapping (N.J.S.A. 2A:118-1), then a high misdemeanor.[1] Hackett was sentenced to the then mandatory term of 30 to 31 years for kidnapping and to a concurrent sentence of 6 months for the assault (Appendix B, A6a to A7a).

On January 4, 1977, Hackett filed a Notice of Appeal to the Appellate Division of the Superior Court of New Jersey. The matter was remanded to permit Hackett to move for a new trial, which application was denied. Hackett then filed an Amended Notice of Appeal and his conviction was affirmed in June 1978 (R1a to R2a). In September, 1978, the New Jersey Supreme Court denied certification (Appendix D, A19a). *State* v. *Hackett,* 78 N.J. 332, 395 A.2d 200 (1978).

Subsequent to the Supreme Court's denial of certification, Hackett began serving his sentence. On October 19, 1978, and while in custody, Hackett filed a Petition for Writ of *Habeas Corpus* pursuant to 28 U.S.C. §2254 in the United States District Court for the District of New Jersey (R2a).

In February, 1979, and prior to a determination of his pending *habeas* application, then Governor Brendan Byrne commuted Hackett's sentence and reduced it from 30 to 31 years to 2 to 3 years (R2a). As a result of the commutation of his sentence, Hackett was released on parole on July 17, 1979 (R2a).

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[1] N.J.S.A. 2A:118-1 was repealed September 1, 1979. Under current New Jersey law kidnapping is a crime of the second degree, if the victim is released unharmed and in a safe place prior to apprehension, and if not, it is a crime of the first degree. N.J.S.A. 2C:13-1.

On July 31, 1980, over one year later, the United States District Court ruled that Hackett had been deprived of his fundamental rights and due process of law because the trial judge had refused to allow him to call alibi witnesses. *Hackett* v. *Mulcahy,* 493 F. Supp. 1329 (D. N.J. 1980). The Court ordered that a writ of *habeas corpus* issue unless the State commenced retrial proceedings against Hackett within ninety days (R4a to R5a).

The State then filed a Notice of Appeal from the grant of *habeas* to the United States Court of Appeals, Third Circuit, which was later withdrawn, and the appeal dismissed on September 22, 1980. Hackett was also advised by the Essex County Prosecutor's Office that they did not intend to retry him (R6a, R8a).

Prior to 1976, Hackett had been licensed by the State of New Jersey as a private detective. In conjunction with his work as a private detective, Hackett was issued a permit to carry a handgun in 1969. The carry permit was annually renewed until 1975, except for 1970. After Hackett's 1976 indictment, he did not then seek any renewal of his permit to carry or of his private detective's license (Appendix G, A66a to A67a).

In 1981, after the grant of *habeas* relief, Hackett again applied for a private detective's license. The Division of State Police initially denied the application on the basis that Hackett's state conviction created a regulatory disqualification for licensure. Following a requested hearing by the Office of Administrative Law, where it was determined that the denial was appropriate, and a further determination by the Superintendent of State Police not

to issue the license, Hackett appealed to the Superior Court of New Jersey, Appellate Division. The Appellate Division reversed and remanded the matter to the Division of State Police for reconsideration of Hackett's application for a private detective's license as if the record of the kidnapping conviction did not exist. *Matter of Hackett,* 190 N.J. Super. 300, 313 (App. Div. 1983) (Appendix G, A67a to A68a).

Subsequent to the ruling of the Appellate Division, which was unchallenged, Hackett was issued a private detective's license by the State Police (Appendix G, A68a).

On July 24, 1984, Hackett submitted applications for permits to purchase a handgun and to carry a handgun to the Chief of Police of Orange, New Jersey. Thereafter, he submitted another application for a firearms purchaser identification card. Hackett was advised in January of 1985 that all of the applications had been disapproved by the Chief of Police. Thereafter, Hackett requested a hearing in the Superior Court of New Jersey, Law Division, pursuant to N.J.S.A. 2C:58-3(d). By Opinion and Order of April 23, 1985, all the permits were granted (Appendices F and G).

Thereafter, the State of New Jersey filed a Notice of Appeal to the Superior Court, Appellate Division, which resulted in the affirmance of the granting of the permits (Appendix H, A87a). The State's subsequent petition for certification to the New Jersey Supreme Court was denied on February 19, 1986 (Appendix J, A93a).

POINT I

The Court lacks jurisdiction to review this matter

The State has invoked the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3), which provides for review by the Supreme Court:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question . . . or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The State argues that the Superior Court of New Jersey, Appellate Division believed that federal law required that it reach the decision which it made twice, namely that the collateral consequences of Hackett's state conviction were removed by the federal grant of *habeas* relief. Therefore, according to the State, the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . ." *Michigan* v. *Long,* 463 U.S. 1032, 1040 (1983).

Since the grant of *habeas* relief, Hackett has applied for and been granted a private detective's license and various firearms permits. In connection with his application for a private detective's license, which was initially denied by the Division of State Police on the basis that his conviction created a regulatory disqualification for licensure, the Superior Court of New Jersey, Appellate Division held that Hackett's conviction was to be treated as if it had been overturned on appeal and was therefore

void as to all collateral civil disabilities. *Matter of Hackett, supra.*

In reaching its determination, the Appellate Division did not believe that either federal law mandated its decision or that the federal *habeas* revised its state conviction. The Court specifically stated at pages 306-307 that:

> "The relief which Hackett seeks on this appeal seems to be precisely the relief the petitioner sought and obtained from the Georgia Supreme Court in *Cooper* v. *State,* namely, an adjudication that a conviction obtained in violation of a federal constitutional right cannot fairly be used by the State to diminish his rights as a citizen. This relief, as noted in *Fay* v. *Noia* (citation omitted), is unavailable in a federal court on *habeas,* which 'cannot revise the state court judgment; it can act only on the body of the petitioner.' *The question before us is whether that relief should be available in this state proceeding.*" (Emphasis added).

Similarly, in granting Hackett's applications for firearms permits, the trial court noted that:

> "The actual setting aside of a state court conviction is unavailable in a federal court on *habeas* which 'cannot revise the state court judgment; it can act only on the body of the petitioner.' *Fay* v. *Noia.* This is so because a *habeas corpus* proceeding directed at a judgment of conviction is a collateral attack on such judgment. *State* v. *Cynkowski,* 19 N.J. Super. 243, 250 (App. Div. 1952), aff'd 10 N.J. 571 (1952)." (Appendix G, A82a to A83a).

In affirming the trial court's determination with respect to the firearms permits, the Superior Court of New Jersey, Appellate Division, relied upon its prior holding in *Matter of Hackett, supra* (Appendix I, A91a).

The New Jersey Courts did not rely on federal law in reaching its decisions, as they did not believe that the federal *habeas* ruling revised the state judgment of conviction. The Court's motivations for its ruling were clearly delineated in *Matter of Hackett, supra,* at page 312, as follows. First, Hackett's conviction could not be used for impeachment purposes under N.J.S.A. 2A:81-12. Second, the District Court granted the writ because Hackett was precluded from presenting his defense. Therefore, the reliability of the facts supporting the conviction was inherently suspect. Third, Hackett was restored in 1981 to his position as a public school teacher, with retroactive reinstatement of all his tenure and pension rights, and the Court believed it would have ". . . create(d) an insensitive irony if (it) held that Hackett, deemed fit to teach children in the public schools, could not even receive the consideration of a fair investigation and evaluation in his quest for a private detective's license."

Since the decisions of the Superior Court of New Jersey, Appellate Division were made on independent state grounds, and not federal law, this Court lacks jurisdiction and the Petition for Writ of Certiorari should be denied.

POINT II

The granting of the Writ of Habeas Corpus removed the collateral consequences of respondent's state judgment of conviction.

The facts in this case may be unique, but they do not present the legal issues posed by appellant in it's Petition for Writ of Certiorari. As argued in Point I, *supra,* the State of New Jersey did not find that it was mandated to relieve Hackett of the civil disabilities flowing from his state conviction by virtue of the issuance of the federal writ of *habeas.* Rather, the State independently exercised its power to grant this collateral relief.

However, if the State had not chosen to do, the repondent submits that the same result is required by federal law.

Respondent does not dispute that historically the sole purpose of the writ of *habeas corpus* was to test the legality of a prisoner's current detention, and that the sole relief which could be granted by the issuance of the writ was the prisoner's release from an illegal confinement. *Fain* v. *Duff,* 488 F.2d 218 (5 Cir. 1973), cert. den. 421 U.S. 999 (1975); *Zaffarano* v. *Fitzpatrick,* 404 F.2d 474 (2 Cir. 1968), cert. den. 395 U.S. 977 (1969).

However, the great writ is not a "static, narrow, formalistic remedy." *Foster* v. *Gilbert,* 264 F. Supp. 209, 212 (S.D. Fla. 1967).

It is clear that the access to habeas relief has been expanded by the liberal interpretation of the "in custody" requirement of 28 U.S.C. §2241(c). *Foster* v. *Gilbert, Id.*; *Hammond* v. *Lenfest,* 398 F.2d 705 (2 Cir. 1968); *Hackett*

v. *Mulcahy,* 493 F. Supp. 1329 (D. N.J. 1980); *Pringle* v. *Court of Common Pleas,* 744 F.2d 297 (3 Cir. 1984).

Federal jurisdiction is not terminated with respect to a *habeas* application even when the petitioner has been unconditionally released from custody prior to adjudication. *Carafas* v. *LaVallee,* 39 U.S. 234 (1968). Prior to *Carafas,* a petition was mooted if a petitioner was released from custody prior to a decision on the merits. *Parker* v. *Ellis,* 362 U.S. 574 (1960).

The next logical step must be that relief other than release from custody is granted by issuance of a writ of *habeas*, especially when the petitioner has been released from custody prior to adjudication. If this is not so, the federal court's consideration of these petitions would be a meaningless exercise and a staggering waste of judicial resources.

This view is not unsupported by case law, which has recognized that the remedies available to a *habeas* petitioner can be other than release from custody. As noted by the Court in *United States ex rel. Hickey* v. *Jeffes,* 571 F.2d 762 (3 Cir. 1978) at page 765: "And while some form of custody may be deemed jurisdictional for federal habeas corpus, 'the statute does not deny the federal courts power to fashion appropriate relief other than immediate release.' (Citation omitted)." This view had been earlier espoused in *Carafas* at page 238:

> "But the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '(t)he court shall * * * dispose of the matter as law and

> justice require. 28 U.S.C. §2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody."

In numerous cases dealing with the liberalization of the "in custody" requirement, the reason given for not mooting the petition is the recognition that many individual rights are affected by a criminal conviction. In *Carafas,* this Court stated at pages 237 to 239:

> "It is clear that petitioner's case is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these disabilities or burdens (which) may flow from petitioner's conviction, he has '*a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.*' On account of these 'collateral consequences' the case is not moot." (Citations omitted). (Emphasis supplied).
>
> * * *
>
> ". . . Petitioner is entitled to consideration of his application for relief on its merits. He is suffering, and will continue to sufer, serious disabilities because of the law's complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious. There is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court."

Also see *Brown* v. *Resor*, 407 F.2d 281 (1969), cert. den. 399 U.S. 933 (1970); *Matthews* v. *State of Florida*, 463 F.2d 679 (1972); *Mizell* v. *Attorney General of N.Y.*, 586 F.2d 942 (2 Cir. 1978), cert. den. 440 U.S. 967 (1979); *Pringle* v. *Court of Common Pleas, supra.*

The appellant recognizes that fundamental rights, such as the right to vote, may not be denied after the granting of a petition for writ of *habeas corpus*. However, it argues that disabilities arising from the state court conviction survived the granting of the writ for state licensing purposes. No cited case makes this distinction. Moreover, the list of disabilities elucidated in *Carafas* refers both to voting and licensing for business.

The appellant also suggests that, in liberalizing the "in custody" requirement, this Court merely recognized that as a result of its action more persons would be able to file petitions, more petitions would be granted, and more retrials would take place in the state courts. The appellant states that the removal of collateral consequences would come about by acquittal at retrial, rather than by operation of the writ.

However, the State, in its analysis, does not deal with the facts presented in the instant case—namely, that the grant of the writ was unchallenged. The State had the opportunity to retry Hackett and declined to do so. It also could have proceeded with its appeal from the District Court's Order granting *habeas* relief, instead of withdrawing it.[2]

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[2] It should be noted that the Appellate Division's ruling in the *Matter of Hackett, supra,* dealing with the respondent's private detective licensure, was also not challenged by the State.

The respondent, under the State's theory, could never have the collateral consequences of his conviction removed. As the State did not retry him, a decision solely within its domain, he would be branded for life with the consequences of a conviction which was unconstitutionally obtained.[3] This would be fundamentally unfair and could not be the result contemplated by this Court.

The view that issuance of a writ of *habeas corpus* has consequences beyond simply releasing the prisoner has been affirmed. In *Rimmer* v. *Fayetteville Police Dept,* 567 F.2d 273, 276-277 (4 Cir. 1977), the Court stated:

> "When, after exhaustion of state court remedies, a prisoner succeeds in an action under §2254, he is the ultimate victor. While the state court judgment is neither reversed nor vacated, the prisoner is released and the state court judgment authoritatively declared void. Thereafter, the state court judgment should have no preclusive effect."

Echoing this view, the Third Circuit in *United States ex rel. Hickey* v. *Jeffes, supra,* at pages 764-765 said:

> "Certainly we must presume, (citations omitted), that there are present and future collateral consequences, in addition to present custody, flowing from the invalid conviction . . . The district court has the statutory authority to relieve Hickey from the collateral consequences, whatever they may be, of an unconstitutional conviction even though it

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[3] The kidnapping conviction could not be expunged. N.J.S.A. 2C:52-2(b).

> would not disturb the general sentence which is sustainable on other counts."

In *Bently* v. *Florida,* 285 F. Supp. 494 (S.D. Fla. 1968), the court granted the writ to a petitioner who had been denied the effective assistance of counsel. The relief granted by the Court was a vacation of the conviction, believing it would be unjust to order a new trial because the petitioner had completed his sentence. Likewise, in *Grandison* v. *Warden, Maryland House of Correction,* 423 F. Supp. 112 (D. Md. 1976), the district court noted that it had the authority in a *habeas* proceeding to order the expungement of petitioner's records against all persons who maintained custody of them.

This Court's post *Carafas* decisions, relied upon by the appellant, are either not inconsistent with the respondent's position or irrelevant to the issues at hand.

In *Hensley* v. *Municipal Court,* 411 U.S. 435 (1973), the issue before this Court was whether an individual subject to a conviction, who is released on his own recognizance, was "in custody" within the meaning of the federal *habeas corpus* statute. The determination was that the custody requirement was met. In *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), the Court held that when a state prisoner, though asserting jurisdiction under the Civil Rights Act, is challenging the very fact or duration of his imprisonment, and the relief sought is a determination that he is entitled to immediate or speedier release from imprisonment, his sole federal remedy is a writ of *habeas corpus.* Finally, in *Stone* v. *Powell,* 428 U.S. 465 (1976), this Court held that a state prisoner could not be granted *habeas* relief on grounds that evidence obtained through unconsti-

tutional search and seizure was introduced at his trial, where the state had provided an opportunity for full and fair litigation of the Fourth Amendment claim. In the instant case, the District Court found that Hackett had been denied the right to present witnesses in his own defense in contravention of the Sixth Amendment.

However, a post *Carafas* decision of this Court, not relied upon by the appellant, supports the respondent's position. In *North Carolina* v. *Rice,* 404 U.S. 244 (1971), this Court noted that a *habeas* challenge to an invalid sentence (instead of an invalid conviction) may be mooted if the petitioner had served the sentence because collateral consequences flow from the conviction and not the sentence. The matter was remanded to determine whether there may be collateral consequences that flow specifically from an invalid sentence when the conviction is valid. At pages 247 and 248, the Court reaffirmed that: "A number of disabilities may attach to a convicted defendant even after he has left prison, and the Court has recognized the standing of such persons to challenge the legality of their convictions even when their sentences have been served."

CONCLUSION

For the reasons stated above, respondent, Mims Hackett, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

SCHWARTZ, PISANO, SIMON & EDELSTEIN
Attorneys for Respondent

By LAURA BERTOLLO

Dated: July 29, 1986

[APPENDIX FOLLOWS]

APPENDIX

Stipulation of Facts (April 1, 1985) (Exhibit J-1)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION ESSEX COUNTY

In the Matter of the Denial of Application of MIMS HACKETT, JR. for permits to purchase handgun, carry handgun, and for firearms identification card.

The foregoing facts are hereby stipulated and agreed between the parties hereto:

1. Mims Hackett, Jr. was indicted by an Essex County Grand Jury (Indictment No. 313775) on May 4, 1976 and charged in four counts with the crimes of atrocious assault and battery, kindnapping, and threatening to take the life of another. He pleaded not guilty to all charges.

2. On November 10, 1976, after trial by jury, Hackett was found guilty of simple assault and battery, contrary to N.J.S.A. 2A:170-26, a disorderly persons offense, and kidnapping, contrary to N.J.S.A. 2A:118-1, then a high misdeameanor.

3. On January 4, 1977, Hackett was sentenced to the then mandatory term of 30 to 31 years for kidnapping and to a concurrent sentence of six months for the assault.

4. On January 4, 1977, Hackett filed a Notice of Appeal with the Appellate Division of the Superior Court of New

Jersey. On June 2, 1977, the Appellate Division remanded the matter for the sole purpose of permitting Hackett to move before the trial court for a new trial on the basis of newly discovered evidence. Hackett's Motion for a new trial was denied on August 17, 1977.

5. An amended Notice of Appeal was then filed with the Appellate Division on August 25, 1977. On June 19, 1978, the Appellate Division affirmed Hackett's conviction.

6. A Petition for Certification was filed with the New Jersey Supreme Court on July 3, 1978 and was denied on September 19, 1978.

7. Following the Supreme Court's denial of Certification, Hackett began serving his sentence. On October 19, 1978, he filed a Petition of Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of New Jersey.

8. On February 22, 1979, Governor Brendan T. Byrne signed an Order for commutation of Hackett's sentence, reducing it from 30 to 31 years to 2 to 3 years.

9. Hackett was paroled on July 17, 1979.

10. By Opinion and Order filed July 31, 1980, the United States District Court for the District of New Jersey ordered the State of New Jersey to commence retrial proceedings against Hackett within 90 days and further ordered that unless such proceedings were commence a writ of habeas corpus would issue.

11. The State of New Jersey withdrew a Notice of Appeal of the Order of the United States District Court of July 31, 1980, and an Order was entered by the District

Stipulation of Facts (April 1, 1985) (Exhibit J-1)

Court on September 22, 1980 dismissing the appeal. By letter dated September 25, 1980 from the Essex County Prosecutor's Office to Hackett's attorneys, Hackett was informed that the State of New Jersey had withdrawn its Notice of Appeal of the District Court action and that the Essex County Prosecutor's Office did not intend to retry him.

Dated: April 1, 1985

STEPHEN J. EDELSTEIN
Attorney for Mims Hacket, Jr.

By: LAURA BERTOLLO

ESSEX COUNTY PROSECUTOR

By: KENNETH P. PLY

Order

(Filed July 31, 1980)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 78-2529

MIMS HACKETT,

Petitioner,

v.

ROBERT MULCAHY and the ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

This matter having come before the Court on petitioner's petition pursuant to Title 28 United States Code §2254 for a Writ of Habeas Corpus, and the Court having reviewed the record, and for the reasons set forth in an Opinion filed this date, having determined that petitioner is in the custody of the State of New Jersey in violation of the laws of the United States;

It is on this 31st day of July, 1980,

ORDERED that the State of New Jersey commence retrial proceedings against petitioner within ninety days and it is further

Order

ORDERED that unless such proceedings are commenced, a Writ of Habeas Corpus shall issue.

HERBERT J. STERN
United States District Judge

I hereby certify that the foregoing
is a TRUE COPY of the original on file
in my office.

ANGELO W. LOCASCIO, Clerk
By: WILLIAM J. HOLLSNEL, JR., Deputy

Order Dismissing Appeal

(Filed—September 22, 1980)

John J. Degnan
Attorney General of New Jersey
By: Donald S. Colburn
Essex County Prosecutor
Essex County Courts Buildng
Newark, New Jersey 07102
(201) 961-7470

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 78-2529

UNITED STATES OF AMERICA, ex rel.
MIMS HACKETT,

Petitioner,

v.

ROBERT MULCAHY and the ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY,

Respondents.

Upon application of the respondents, it is on this 22 day of September, 1980;

ORDERED that the appeal filed by the respondents be and hereby is dismissed.

HERBERT J. STERN
United States District Judge

Order Dismissing Appeal

I hereby certify that the foregoing
is a TRUE COPY of the original on file
in my office.

ANGELO W. LOCASCIO, Clerk
By: WILLIAM J. HOLLSNEL, JR., Deputy

Letter dated September 25, 1980 from John S. Redden to Paul Montabano (Exhibit J-14)

[Letterhead of Essex County Prosecutor]

September 25, 1980

Paul Montalbano, Esq.
Schneider, Cohen & Solomon, Esqs.
591 Summit Avenue
Jersey City, New Jersey 07306

Re: *Mims Hackett* v. *Robert Mulcahy, et al.*

Dear Mr. Montalbano:

Please be advised that the State of New Jersey has withdrawn the Notice of Appeal filed in this matter. In addition, the Essex County Prosecutor's Office does not intend to retry Mims Hackett at this time.

Very truly yours,

John S. Redden
Assistant Essex County Prosecutor

JSR:sew